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IN THE

Supreme Court of the United States

October Term, 1932

No......

CHARLES P. BULLARD et al.,

Petitioners,

vs.

CITY OF CISCO, TEXAS,

Defendant.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof

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To the Supreme Court of the United States:

NATURE AND RESULT OF THE SUIT

Petitioners, Charles P. Bullard, John R. Brandon, Henry E. Poor, and Robert D. White, alleging themselves to be citizens of New York and Ohio, respectively,

sued the City of Cisco, a municipal corporation organized and incorporated under the general laws of the State of Texas, and having its situs within the Abilene Division of the District Court for the Northern District of Texas. The case was tried before Honorable James C. Wilson, who entered judgment dismissing the Petitioners' suit on the ground that the Petitioners had conclusively made the suit in violation of Section 37 of the Judicial Code.

From this judgment the Petitioners appealed to the Circuit Court of Appeals for the Fifth Circuit. That court on the 21st day of December, 1932, entered a final judgment reversing the judgment of the trial court; but nevertheless holding that jurisdiction as to only a part of the cause of action existed in the Federal Court. The above named Petitioners pray for a Writ of Certiorari and review of the order and decree of the United States Circuit Court of Appeals for the Fifth Circuit entered as aforesaid, a certified copy of the record and proceedings whereof we are filing and presenting herewith.

SUMMARY AND SHORT STATEMENT OF THE MATTER

The City of Cisco, Texas, at different times issued various series of bonds and created a special sinking and interest fund for their payment, for which a specific

tax levy was made. The total outstanding bonded indebtedness at the time of the trial of the case approximated Four Million Dollars. Long prior thereto the City of Cisco had defaulted in payments of both principal and interest. Various bondholders residing in different states of the Union other than Texas had transferred bonds held by them to the Petitioners herein, the aggregate amount of such transfers being approximately Two Million Dollars. These transfers were made under a written contract between the Bondholders and the Petitioners herein, which is set out at pages 21 to 37 of the Record.

The Petitioners in their petition in the trial court properly described the bonds, alleging themselves to be the owners of them under transfers from various holders, all of which are alleged to reside in States other than Texas. The bonds were all payable to bearer. Proper allegations of diversity of citizenship were made, as appears from the Petitioners' petition in the trial court. The defendant, among other pleadings, embraced in its answer a denial of jurisdiction on the ground that Petitioners were not the owners of the bonds and coupons sued upon, but that the bonds and coupons were delivered to them solely for the purpose of collection without the deposit in them of any beneficial interest. The only proof in the record as to the amount of past due coupons and bonds transferred to the Petitioners

by bondholders was that three of the transferors of bonds and coupons transferred bonds upon which in each instance there were past due coupons aggregating more than the jurisdictional amount.

There being no proof as to the amount of bonds and coupons transferred to the petitioners herein by the bondholders except as to the three above mentioned, the Circuit Court of Appeals held that the judgment of dismissal was erroneous as to these three transfers of bonds to the petitioners, but that the suit was properly dismissed as to all the other bonds and coupons sued upon by Petitioners, and as to which there was no proof one way or the other as to specific amounts transferred by the respective transferors to the petitioners.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Section 37 of the Judicial Code, upon which the Circuit Court of Appeals relied to sustain the order of dismissal as to all of the bonds held by petitioners (except as to those bonds in the three instances where it affirmatively appears in the record that the transferors each had past due coupons aggregating more than $3,000), as construed by this Honorable Court, Barry v. Edmunds, 116 U. S. 550, 20 L. Ed. 729, does not authorize dismissal for want of jurisdiction unless it affirmatively

appears from the record that the transfers were made solely and exclusively for the purpose of creating a case cognizable in a national court, and before it can be held that the transaction is colorable or collusive so that a dismissal for want of jurisdiction will be sustained, the facts on the record must create a legal certainty of that conclusion. A mere surmise without judicial ascertainment that the transfers were made for the sole purpose of creating jurisdiction is not sufficient to support a judgment of dismissal, and the Circuit Court of Appeals in its decision in this case did violence to the terms and provisions of Section 37 of the Judicial Code, as construed by this court, in holding without evidence that the respective transfers to the petitioners constituted the collusive making of a suit in the Federal Court.

2. The decision of the Circuit Court of Appeals in holding that the cause should be dismissed as to all the suit except the amounts embraced in the three particular transfers above mentioned, is in direct and palpable conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, in the case of Hill v. Walker, 167 Fed. 241, for the reason that in the latter case it was held that jurisdictional averments accomplish their purpose immediately upon the filing of the complaint giving plenary jurisdiction of the court, which is not suspended by denial in the answer, or defeated by such denial combined with an inaccuracy or insufficiency of

proof on the subject, but continues unimpaired until evidence is produced clearly showing that jurisdiction does not in fact exist, whereas in this case the Circuit Court of Appeals has held that it is proper to dismiss for want of jurisdiction upon a mere surmise or suspicion, without the introduction of any competent proof to support the plea of non-jurisdiction.

3. The decision herein by the Circuit Court of Appeals for the Fifth Circuit to the effect that the absence of proof that each transferor of bonds had an indebtedness due at the time of the transfer equal to the jurisdictional amount authorized judgment of dismissal, is in conflict with the former decision of that court in the case of Rojas-Adams v. Young, 13 Fed. (2) 289, and is in conflict with that court's former decision in the case of Estero Bay Estates v. Giddens, 14 Fed. (2d) 172, and is also in conflict with the decision of the Circuit Court for the Sixth Circuit, in the case of Village of Kent v. Dana, 100 Fed. 56.

4. The holding, in effect, of the Circuit Court of Appeals for the Fifth Circuit, that there being an absence of proof from the record of the amount of the transfer in each instance to the petitioners, the transfers were colorable and collusive, is in direct conflict with the decision of this Honorable Court in the case of Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 48 Sup. Ct. 404, 72 L. Ed. 383.

5. The question presented by the record is a question of public character and is of grave interest and concern, and ought to be determined by this court, because under current conditions in this country, municipal bonds are usually and commonly sold to numerous and divers individual citizens residing in various states other than that in which the debtor municipality is domiciled. As a practical matter, bondholders' committees have been and are now organized, because of the necessity of the situation in such circumstances to make adjustments in connection with refunding bondholders' claims against municipalities in financial embarrassment. Such committees as Trustees, being contractually clothed, as in this instance, with title and various specific rights and powers of negotiation in connection therewith as citizens of the United States, have such title as to confer jurisdiction in the federal courts, upon the appearance on the record, as in this case, of title to the bonds in the aggregate exceeding the jurisdictional amount, there being no question of lack of diversity of citizenship.

6. The petitioners sued as owners of the bonds under transfers. The bonds were payable in each instance to bearer. Under the Negotiable Instrument Law of Texas an instrument payable to bearer is negotiated by mere delivery. We quote from that law as follows:

"An instrument is negotiated when it is transferred from one person to another in such manner

as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery * * *". (Sec. 30, Art. 5934, Annotated Texas Statutes.)

The holding of the Circuit Court of Appeals constitutes a setting aside as void and nugatory this section of the statutes of the State of Texas, because the instrument under which the petitioners hold the bonds, all of which are payable to bearer, not only constitutes a conveyance of title, but clothed the petitioners with various rights, duties and obligations, apart from the right of litigation, as Trustees of the bonds and coupons sued upon. The instrument under which the bonds were conveyed to the petitioners, denominated a "Deposit Agreement" appears on pages 21 to 37 of the Record. This agreement is not, as treated by the Circuit Court of Appeals, merely an agreement constituting the petitioners a collecting agency. It is an express trust. It contains all the elements essential to the creation of an express trust, making these petitioners Trustees, with definite duties, powers, rights and responsibilities. There is a conveyance or a transfer to persons capable of holding the property transferred; there is an object or fund transferred, and there is a cestui que trust, and a purpose to which the trust agreed upon is to be applied.

Not only do all the elements of an express trust appear from the terms of the contract reposing title in

the purchasers, but the defendant itself, in its pleadings as well as in its treatment of the case throughout, expressly treats the contract as a trust indenture. The contract embracing all the elements which create an express trusteeship as distinguished from an agency, and the parties having so treated it, the Circuit Court of Appeals could not ignore the proposition of trust relationship urged in the brief before it, and hold the transaction to be a colorable or simulative or collusive one, without doing violence to the decision of this Honorable Court in Taylor v. Mayo, 110 U. S. 330, 28 L. Ed. 163. In its disposition of the case it has brought itself into conflict with the case of Fuller v. Venable, 118 Fed. 553, and Parker v. New England Oil Corporation, 8 Fed. (2) 392.

7. The Circuit Court of Appeals for the Fifth Circuit misapplied Section 37 of the Judicial Code, and misapplied the decisions in Farmington Village v. Pillsbury, 114 U. S. 139; Waite v. Santa Cruz, 184 U. S. 302; Williams v. Nottawa, 104 U. S. 208; Inhabitants of Bernard's Township v. Stebbins, 109 U. S. 301; Lake County v. Dudley, 173 U. S. 243; Webb City v. Beckham, 216 U. S. 117. A correct application of Section 37 of the Judicial Code and of the interpretation of the above mentioned cases requires a modification of the judgment of the Circuit Court of Appeals, to the effect that the

court has jurisdiction of all of the whole amount involved in the suit under the pleadings filed by the petitioners.

In the first place, there is no evidence in the record that the transferors from whom the petitioners received the bonds, each could not have sued in his own name. In the second place, the title to all the property was reposed in the petitioners as Trustees, and as such Trustees, petitioners were clothed with the sole and exclusive authority to maintain the suit under the rule announced by this court in Dodge v. Tulleys, 144 U. S. 451; Kokusi Kisen Kabushiki Kaisha v. Argos Merc. Corp., 280 Fed. 700 (Certiorari denied 258 U. S. 630, 66 L. Ed. 801), and Susquehanna & Wyo. Valley R. R. Co. v. Blatchford, 11 Wall 172, 20 L. Ed. 179.

The ultimate question is solely and simply that of jurisdiction. For the reasons stated, we respectfully submit that a writ of certiorari should be allowed and the question decided by this Honorable Court.

Wherefore, your petitioners pray that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify the above stated cause to this court for review and determination, as provided by law, and that your petition-

ers may have such other and further relief in the premises as to this Court may appear proper.

Respectfully submitted,

CHARLES P. BULLARD,

JOHN R. BRANDON,

HENRY E. POOR,

ROBERT D. WHITE,

Petitioners.

By Dexter Hamilton

Of Counsel.

CALDWELL & RAYMOND,
New York, N. Y.

McBRIDE, O'DONNELL & HAMILTON,
Dallas, Texas.

By Dexter Hamilton

Counsel

THE STATE OF TEXAS)
)
COUNTY OF DALLAS)

I, L. C. McBride, being duly sworn, depose and say: That I am one of the Counsel for the Petitioners in the foregoing petition, and that I have read the petition and know the contents thereof, and that the facts therein stated are true to the best of my knowledge, information and belief.

Lawrence C. McBride

Sworn to and subscribed before me this the ..... day of March, A. D. 1933.

Notarial Seal Roberta Mullens

Notary Public, Dallas County, Texas.

COUNSEL'S CERTIFICATE OF MERIT.

We hereby certify that we have examined and read the foregoing petition for a writ of certiorari; that in our opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

Dated this the 6th day of March, 1933.

CALDWELL & RAYMOND
McBRIDE, O'DONNELL & HAMILTON,
Counsel for Petitioners.

Dexter Hamilton
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1932

No......

CHARLES P. BULLARD et al.,

Petitioners,

vs.

CITY OF CISCO, TEXAS,

Defendant.

Brief in Support of Petition for Writ of Certiorari

To the Supreme Court of the United States:

BRIEF STATEMENT OF THE PLEADINGS

The petitioners in the trial court clearly and explicitly alleged diversity of citizenship and jurisdictional amount in controversy (Record p. 2). The different bond issues made by the defendant, City of Cisco, were alleged and described (Record 2 to 7). It was alleged that at the time of the issuance of the various and sundry bonds, coupons

were executed and issued representing the interest payments and that both the bonds and the coupons were in form and in fact negotiable instruments, payable to bearer (Record 7). It was explicitly alleged that the petitioners were the owners of, and held title to, certain of the bonds and coupons, which were fully described (Record, pp. 8 to 15). It was alleged that bonds the title to which were held by petitioners and past due, amounted to $14,000, and that interest coupons the title to which was held by petitioners and past due, amounted to more than $335,000.00 (Record p. 15).

They prayed for judgment for the amount of past due bonds and past due interest coupons held and owned by them. (Record 15, 16).

The answer embraced an allegation that the defendant believed and alleged that no holder of bonds or interest coupons past due had an amount sufficient to give jurisdiction, and alleged that the petitioners were not in fact the holders and owners of the bonds sued upon, or any of them, but that the bonds and coupons were delivered to them merely and solely for the purpose of collection, without their having any beneficial interest whatever in them (Record 17).

Various interventions were filed by non-residents. The Reserve Loan Life Insurance Company, a corporation incorporated in the State of Indiana, intervened and sued for past due indebtedness on bonds of the same

series sued upon by these petitioners, and sought the recovery of $7,500.

The Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association formed under the laws of the State of Ohio, suing through certained named officers who resided in the State of Ohio, sought recovery of the sum of $17,920.

S. M. Berry, J. M. Phillips and J. E. Rogers, citizens of Iowa, intervened as Trustees for the Mutual Benefit Department of the Order of Railway Conductors of America, and sought recovery of past due and unpaid bonds and coupons aggregating $12,600.

The United Mutual Life Insurance Company, incorporated under the laws of the United States of America, domiciled in the City of Indianapolis, Indiana, intervened and sought recovery of past due and unpaid bonds and coupons aggregating $5,370 (Record 39 to 66).

UNDISPUTED FACTS

There is no dispute in the facts on the record. These petitioners introduced in evidence past due bonds and coupons aggregating $349,787.50 (Record 67 to 72).

The petitioners introduced undisputed evidence to the following effect: (1) That the petitioners were the holders of all the bonds described in the petition; (2) That

the bonds, which are all payable to bearer, as shown by the record, were transferred to petitioners by actual delivery and were on deposit in the Liberty National Bank & Trust Company of New York, in the name of, for, and subject to the control, dominion and disposition of the petitioners; (3) That no bond transferred to petitioners was owned by any citizen of Texas; (4) That among the bonds upon which matured and past due coupons exceeded $3,000, there were transferred to the petitioners, the following:

(a) From George C. Averill, Waterville, Maine, bonds upon which past due coupons aggregated $5,403.75;

(b) From the Title & Guaranty Trust Company, Cincinnati, Ohio, bonds upon which past due coupons aggregated $3,120.00;

(c) From E. Schier Welsh, Boston, Mass., bonds upon which past due coupons aggregated $5,590.00.

That the exclusive control, dominion and ownership of the bonds sued upon were in the petitioners under the terms of a certain agreement dated January 3, 1930, which itself was introduced in evidence (Rec. pp. 73, 74). The above mentioned agreement was attached to the defendant's answer and is set out on pages 21 to 37 of the Record.

This agreement embraces substantially the following:

That the City of Cisco having failed to pay its interest and certain principal payments on bonds, and it being desirable that the holders of bonds and coupons should unite or organize for the protection of their interests, which could be accomplished most effectively and with the least expense by the appointment of a bondholders' committee, with full power and authority in the premises, and the committee having consented to act for the bondholders and coupon holders, the members of the committee and the bondholders agreed:

That bonds and coupons deposited with the committee shall be held and disposed of by the committee or its depository, subject alone to the order of the committee. It was provided that neither the committee nor its members individually, should be liable for the acts or omissions of any agent, attorney or employee of the committee, nor for any act of a member of the committee, except such member's wilful misconduct.

It was provided that every depositor of bonds should receive, in conformity with the terms of the agreement, a certificate of deposit signed by the depositary receiving the same, and that such certificate should be transferable only upon the books of the depositary issuing the certificate; that a transferee of any such certificate of deposit after its issuance, duly endorsed by the deposi-

tary, should upon surrender of such certificate, receive a new one for the amount of the bonds or coupons in the name of such transferee or his nominee, who should thereafter be deemed the depositor, and it was further provided that the registered holder of any such certificate should be deemed for all purposes to be the owner of the certificate and of the bonds and coupons referred to in it, so that neither the depositor nor the committee should be affected by any notice to the contrary. This provision is embraced in the sixth section of the agreement. In this same section it is provided that no depositor should have any right to withdraw any bonds or coupons deposited under the agreement, nor to take any action with respect to deposited bonds or coupons and that no other bonds or coupons deposited should be satisfied or discharged except as may be expressly declared and provided by the committee (Record, pp. 26, 27).

The agreement contained the express provision that every depositor sells, transfers, assigns and delivers to the committee, and its successors, every bond and coupon deposited under the terms of the agreement, and all his right, title, interest, property and claim at law, or in equity, by virtue of said bonds and coupons or any instrument securing them, and in and to the property and assets of the City, whether or not mortgaged to secure the bonds and coupons, or otherwise, and they all contract that the committee shall be vested with full legal title

to all the bonds and coupons deposited under the agreement and to every claim based therein (Record, pp. 27, 28).

The contract embraces an express stipulation that the committee, the petitioners here, may, as the owner and holder of deposited bonds and coupons, demand, collect and receive all moneys due and payable thereon, and take or cause to be taken, or participate in, or settle, any action or proceeding for the collection of the bonds or the protection, enforcement or foreclosure of any lien securing or pertaining to them, including liens arising from the enforcement of taxes, levies, assessments, etc. The agreement clothes the committee with the power to purchase, acquire, contract in regard to, deal in, sell or dispose of any property which may be affected by any lien foreclosure or taxes. The agreement further provides that the committee may exercise all the rights of ownership over any property or securities acquired by it (Record p. 28).

The committee is given the power to borrow from time to time such money as the committee deems necessary or desirable, and to pledge any or all of the bonds and coupons deposited as collateral security for the payment of such loan or loans (Record p. 29).

Not only does the deposit agreement deprive the transferors of bonds of any right to control or dispose of any bonds or coupons (Record 27) but the committee is given

full power to make any plan or agreement for refinancing or readjustment, including provisions for the acceptance of any other obligations, evidence of indebtedness, or property of, or claims against the City of Cisco (Record 31).

The above is substantially an epitomized statement of the uncontradicted record.

We submit the petition for certiorari upon the following points:

POINT I.

The transfers of the bonds to the petitioners by various holders in conformity with the deposit agreement was a real, not a colorable deposit of title, and it appearing that the transfers were not solely and exclusively for creating federal jurisdiction where none previously existed, jurisdiction as to all claims in the suit exists without regard to the values of respective groups of bonds transferred by the different transferors.

POINT II.

There being no proof of amounts transferred except in three instances where the respective amounts of claims exceeded the amount required under Section 24 of the code to give jurisdiction, and diversity of citizenship as to all transferors being conclusively establish-

ed, the record contains no proof to sustain the judgment of the Circuit Court requiring dismissal for lack of jurisdiction.

POINT III.

Jurisdiction both as to parties and amount conclusively appears from the face of plaintiff's petition, and the jurisdictional averments of the complaint not being made as a basis for proof but to found jurisdiction, plenary jurisdiction in this cause in the federal court arose upon the filing of the petition and continued unimpaired unless the evidence adduced in the case clearly shows with certainty that jurisdiction in fact does not exist, and the facts introduced in evidence not tending to establish as a legal certainty that the court was without jurisdiction, the judgment of dismissal was fundamentally wrongful and erroneous as a matter of law.

POINT IV.

A dismissal for want of jurisdiction must as a matter of law be based upon judicial ascertainment of facts from the proof in the record that the court was without jurisdiction, and such facts must be of that probative quality which convinces the mind to a legal certainty. Since the record in this case fails to meet this requirement, the court erroneously held that no jurisdiction existed.

POINT V.

The deposit agreement in legal effect creates an express trust whereby the petitioners become the holders of the legal title to the bonds and coupons, in trust, for the purposes expressed in the trust agreement, and as trustees they were clothed with ownership of title upon which they could rightfully invoke federal jurisdiction upon the ground of diversity of citizenship.

ARGUMENT

Section 37 of the Code bears a uniform construction under the decisions of this court, and under most of those of the lower federal courts, to the effect that before jurisdiction can be denied by reason of the provisions of this section of the Code, the purpose of the transfer must appear to a legal certainty from the record to have been solely and exclusively to give jurisdiction to the national courts where none formerly existed. If this should be one of the purposes disclosed by the record, but other purposes involved in the transfer also appear, then the transaction does not in that event constitute improperly or collusively making a suit for federal court jurisdiction.

The jurisdictional averments of the complaint made in the federal courts when filed bring into action plenary jurisdiction of the court over the suit. A pleading denying

the jurisdiction does not impose upon the plaintiff any burden of proving jurisdiction. Such denial must be sustained in order to defeat jurisdiction by proof adduced on behalf of the defendant, clearly showing that jurisdiction in fact does not exist. The plaintiff's pleading of jurisdictional facts has the following effect: First, it makes a prima facie case in favor of jurisdiction. Second, the jurisdiction thus established continues until the adverse party produces competent evidence to establish with legal certainty that the court is in fact and in truth without legal cognizance of the suit.

Barry v. Edmunds, 116 U. S. 550, 20 L. Ed. 729.

Hill v. Walker, 167 Fed. 241.

We quote from the latter case as follows:

"The jurisdictional averments of the complaint in federal courts are not made as a basis for proof at the trial, but to found jurisdiction of the suit. They are not held in suspense until supported by proof, like allegations respecting the merits, but immediately upon the filing of the complaint, they accomplish their purpose. Thereupon by virtue of such allegations, plenary jurisdiction of the court over the cause arises. That jurisdiction is not suspended by a denial in the answer or defeated by such a denial combined with an inaccuracy or insufficient proof on the subject, but continues unimpaired until evidence is produced showing clearly that jurisdiction in fact does not exist. What, then, is the force

"and effect of a proper pleading of jurisdictional facts? (1) It makes a prima facie case in favor of jurisdiction. (2) Such jurisdiction continues until evidence is produced which convinces the mind to a 'legal certainty' that the court in fact is without lawful cognizance of the suit."

From the same case we quote the following language:

"In Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 20 L. Ed. 729, it was held that a suit cannot properly be dismissed by a Circuit Court of the United States, as not involving a controversy within the jurisdiction of the court, unless the facts when made to appear on the record create a legal certainty of that conclusion. 'Nothing less than this', said Mr. Justice Matthews, 'is meant by the statutes when it provides that the failure of its jurisdiction on this account, shall appear to the satisfaction of said Circuit Court'."

The defendant in this case while raising the question of jurisdiction by its pleadings, made no effort to tender any proof to sustain the allegations of lack of jurisdiction, and the jurisdictional facts clearly appearing from the averments of the pleading, there is no basis, as we view it, for the judgment of the Circuit Court of Appeals holding that the suit should be dismissed as to all those claims transferred to the petitioners which the petitioners failed to establish affirmatively and seriatum to be in an amount within the federal court jurisdiction. No duty rested upon the petitioners to establish the juris-

dictional facts alleged in their petition. To defeat jurisdiction, the burden was upon the defendant to prove to a legal certainty facts and circumstances which, under section 37 of the code would defeat jurisdiction. The defendant having failed to undertake or discharge this burden, a judgment of dismissal based upon the court's mere personal opinion or suspicion, instead of upon judical ascertainment derived from facts, cannot rightfully and legally be sustained.

The clear effect of the opinion by the Circuit Court of Appeals is to put the burden of proving the fact of jurisdictional amount to have been included in each transfer to the petitioners, upon the petitioners themselves instead of upon the defendant in the case. This clearly appears from the following language quoted from the opinion of the Circuit Court of Appeals:

> "The answer of the appellee having raised an issue as to any of the beneficial owners of bonds and coupons sued on owning or holding an amount thereof sufficient to give the court jurisdiction, and there being no evidence tending to prove that any such owners, except the three above referred to, owned past due bonds or coupons sufficient in amount to give the court jurisdiction of a suit thereon, the record fails to show that the past due bonds or coupons owned by any transferor, except the three above mentioned, were sufficient in amount to enable the real owner to sue thereon. In so far as the suit for the enforcement of claims upon

> which the real owners could not have sued because of the insufficiency of the amount of their claim or claims, it did not really and substantially involve a dispute or controversy properly within the court's jurisdiction, and, so far as regards those claims,—the inclusion of which in the suit evidences a purpose to get the court to take cognizance of a dispute or controversy not properly within its jurisdiction,—the suit should have been dismissed.

The action of the court thus revealed not only does violence to the provisions of Section 37 of the Code, but disregards and conflicts with former decisions of this court as indicated in the above petition and those of other Circuit Courts of Appeals.

However much of the courts may consider the purpose and the motive of the petitioners and those from whom the bonds were transferred, as revealed by the written contract set forth in the record, it must conclusively appear, so it seems to us, that various purposes besides mere litigation were involved in the making of the contract. We have enumerated those purposes in setting forth under the preceding statement the terms of the contract. To avoid repetition, we respectfully refer the court to that statement.

We now refer the court to other decisions of the Circuit Court for the Fifth Circuit, which sustain the view we assert to the effect that, other bona fide purposes than that of litigation clearly appearing from the con-

tract, jurisdiction can not be denied on the ground that the transaction was for the purpose of perpetrating a fraud on the jurisdiction of the federal courts.

Rojas-Adams v. Young, 13 Fed. (2d) 989, Circuit Court.

In this case a motion was filed to dismiss for want of diversity of citizenship, on the ground that the plaintiff was a sham corporation organized by citizens of Louisiana (the state in which the defendants lived), the corporation being a Delaware corporation organized for the purpose of perpetrating a fraud on the jurisdiction of the court. The trial court sustained the motion to dismiss the case. On appeal it was held that the jurisdiction was properly laid in the federal court. The appellate court found that the purpose of the agreement, among other things, was to control by lease certain lands with trapping privileges. The defendants in the case before the corporation was effected and at the time it was formed were in possession of the land and refused to vacate it, with the result that the suit was filed. The facts were substantially these: In connection with the organization of the corporation the parties consulted a reputable attorney and he advised them to incorporate under the laws of Delaware for two reasons:

First, because under such incorporation more favorable exchange of stock for land could be made; and

Second, because, the corportion being a foreign one, could bring suit against the defendant or trespassers who were citizens of the State of Louisiana and thereby avoid local prejudice.

From these two sets of facts, Judge Foster said that good faith was easily deduced and that although the incorporators anticipated litigation, they had the right so to arrange their affairs as to have access to the federal courts, it being done legally and in good faith. In that case the various interests of the parties in the land were transferred to the corporation and stock was issued representing their interests. Yet under these circumstances, the corporation being organized for the two reasons above mentioned and not *solely for federal* jurisdiction was maintained.

Estero Bay Estates v. Giddens, 14 Fed (2) 172.

This was a suit brought to remove cloud from title to certain lands in Florida. Dismissal was sought on the ground that one of the purposes in perfecting the corporation was to bring suit in the Federal Court. Section 37 of the Judicial code was invoked and the case was submitted on a stipulation covering the reasons for incorporating. One of the reasons specified was that if litigation should arise involving title to the lands, the corporation being a foreign one, could invoke the jurisdiction of the federal courts instead of the state courts.

Other reasons for incorporation were included as follows:

1. The incorporators did not desire to have their investments in the property connected with their personal business.

2. They desired to sell without the joint consent of their associates and their wives.

3. The stock issue could be used as collateral.

4. Avoidance of inconvenience.

5. Avoidance of personal liability.

The court held that the enumerated reasons being among the purposes of the incorporators, the purpose to put themselves in a position to invoke the jurisdiction of the federal courts was not the sole reason for the incorporation, and accordingly held that even if one of the reasons was to invoke the jurisdiction of the federal courts, the transaction did not come within the terms of Section 37 of the Code.

In the case of Black & White Taxicab Company vs. Brown & Yellow Taxicab Company, 48 Sup. Ct. 404, 72 L. Ed. 383, the facts were substantially these:

The L. & N. Railroad Company made a contract with the Brown & Yellow Taxicab and Transfer Company, giving the latter the exclusive privilege of going upon its trains, into its depots and surrounding premises to

solicit baggage and passengers, and assigned a plot of ground belonging to it to the use of the Taxicab Company, awaiting the arrival of trains. The Black & White Taxicab Company undertook to use the grounds of the Railroad Company to solicit business in like manner as the Brown & Yellow Taxicab Company.

The Plaintiff, the Brown & Yellow Taxicab Company, was originally a Kentucky Corporation. The railroad company and the Black & White Taxicab Company were Kentucky corporations. The Brown & Yellow Taxicab & Transfer Company dissolved its Kentucky corporation and formed, under the same name, with the same assets and with the same incorporators, a Tennessee corporation, and took over as the sole capital stock the properties of the Kentucky corporation. The plaintiff had no property in Tennessee. It transacted no business there. It kept no books there and had no office there. It was expressly agreed and conceded that the plaintiff corporation dissolved its Kentucky corporation and reincorporated in Tennessee for the purpose of bringing suit in the Federal Court and for no other purpose.

On these facts the Supreme Court of the United States held that the case was properly cognizable in the federal court, Judge Butler saying:

> "The motives which induced the creation of respondent to become successor to its Kentucky grantor and take a transfer of its property, have no in-

fluence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. Under these circumstances courts will not inquire into the motives when deciding concerning their jurisdiction.

Also see the following authorities:

Cyc. Fed. Proced. Sec. 93 and 1196.

Ind. Sch. Dist. v. Rew, 111 Fed. 1;

Scott Co. v, Advance-Rumley, 288 Fed. 739.

Thompson v. Searcy, 57 Fed. 1030.

Doane v. Calif. Land Co., 243 Fed. 70.

The contract under which the committee operates, to our minds, construed in connection with the actual delivery of the bonds and coupons, all of which are payable to bearer, constitutes a bona fide transfer of title to the Committee. It is immaterial what the purpose of the transfer was; the question is—have the various owners by the delivery of the bonds under this contract effectively transferred title so as to give the Committee dominion and control over the bonds of that quality which constitutes ownership as a matter of law? If the transfer deposits ownership, in the most expansive meaning of that term, in petitioners, then it seems to us that the transaction does not come within the terms of the statute, and that the petitioners have all the rights as plaintiffs given

by jurisdictional statutes. We here call attention to the various judicial definitions of the word "Owner", and of the words "To Own."

> "The word 'owner' includes any person who has usufruct, control, or occupation of real estate, whether his interest in it is an absolute fee, or in estate for years under lease. A tenant for a term of years is an owner of property, within the general or popular meaning of the word, and he may properly allege himself to be owner in a complaint in an action of ejectment brought against his landlord."
>
> Owner, 6 Words & Phrases, p. 5143-5, citing a Minnesota case.

> "The word 'owner' is not a technical term. It is not confined to a person who has the absolute right in the chattel, but also applies to the person who has possession and control of it."
>
> Owner, 6 Words & Phrases, p. 5148, citing a Massachusetts case.

> "'To own' is defined, 'to hold as property; to have a legal or rightful title to; to have, to possess'. And an 'owner' is 'one who owns; a rightful proprietor'. An 'Owner' is not necessarily one owning the fee simple or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner, and, indeed, there may be different estates in the same property vested in different persons, and each be an owner thereof. United

States v. Ninety-Nine Diamonds, 139 Fed. 961, 971, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185 (quoting Baltimore & O. R. R. Co. vs. Walker, 16 N. E. 475, 45 Ohio St. 577, 585). Jones vs. States, 70 N. E. 952, 954, 70 Ohio St. 36, L. Ann. Cas. 618 (quoting and adopting definition in Baltimore & Ohio R. R. Co. vs. Walker, 16 N. E. 475, 45 Ohio St. 577)."

Owner, Words & Phrases, Second Series, page 485.

"An 'owner' is one who has dominion over that which is the subject of the ownership. He has the right to make use of it, consistently with the rights of others, as he may see fit. The ownership may extend to the entire thing, or may be limited to an interest in it, and whatever is the subject of the ownership is held by the owner for his own individual benefit. Hare v. Young, 26 Idaho 682."

Owner, 5 Words & Phrases, Third Series, p. 783, citing an Idaho case.

"The word 'owner' is not infrequently used to describe one who has dominion or control over a thing, the title to which is in another. Lockhart v. State, 60 So. 591, 6 Ala. App. 61; Robinson v. State, 62 So. 303, 306, 7 Ala. App. 172".

Owner, 5 Words & Phrases, Third Series, p. 783.

The question is, does the acceptance of the provisions of the contract by transferors and the delivery of the bonds to the appellants under it disclose an intention to transfer a title? And this intention must be determined from the facts peculiar to the transaction. These facts

must disclose to a legal certainty that a bona fide intention to pass any title did not exist before a judgment of dismissal can be sustained.

The cases principally relied upon to support the decision of the trial court are the following:

Farmington Village v. Pillsbury, 114 U. S. 138, 21 L. Ed. 134.

Waite v. Santa Crus, 184 U. S. 302, 46 L. Ed. 552.

Williams v. Nottawa, 104 U. S. 208, 26 L. Ed. 719.

Inhabitants of Bernard's Township vs. Stebbins, 109 U. S. 341.

Lake County v. Dudley, 173 U. S. 243.

To our minds an analysis of these respective cases, properly considered, reveals a distinction between them and the instant case under its peculiar facts, assuming for the purposes of argument, and only for those purposes (there being no evidence in the record to support the assumption) that none of the transferors of bonds and coupons transferred to the petitioners in this case such bonds and coupons of the value of $3,000.00. We make this assumption because as a matter of grave practical concern to bondholders and business men we believe a clear and distinct decision on the theory of the court and of the defendant necessary in the interest of the public, as well as in that of these parties.

We will take up the cases in the order named and call to the court's attention as briefly as possible the facts involved in those cases upon which the respective decisions turn.

Farmington Village v. *Pillsbury*, supra: This is the case principally relied upon by the court in rendering a decision adverse to us. We submit that the facts of that case conclusively revealed a fraudulent attempt to acquire jurisdiction in the federal court and that no other purpose was involved in the transaction. The coupons of the bonds of the Village of Farmington involved in the pretended purchase had been declared void by the court of last resort in the State of Maine two years prior to the pretended transfer to the bonds. It rendered an opinion to the effect that the statute authorizing the issuance of bonds was unconstitutional and void. This was in 1878. In 1880, after the coupons had been declared void and of no value whatsoever, Pillsbury acquired from a holder of the bonds named Dyer an amount within the jurisdiction of the Fderal Court under a pretended transfer in connection with which he executed his non-negotiable note for $500.00, payable two years after date. Pillsbury filed suit under these circumstances. The present statute had not been enacted.

Certainly there could be no bona fide transfer of bonds the entire value of which had been destroyed by the above mentioned decision of the Supreme Court of Maine,

and the United States Supreme Court, in the light of the simple facts above mentioned, held that the transfer of the coupons was a mere contrivance, a pretense, the result of a collusive arrangement to create a fictitious ground of federal jurisdiction by the transfer of these coupons from a citizen of Maine to a citizen of Massachusetts, so as to get a re-examination of the question of the validity of the bonds in the federal court.

In the Cisco case the court's ruling in effect was that all of the coupons and bonds were valid and subsisting obligations. All those sued upon were in the physical possession of the petitioners in this case. They had been delivered, and under the Negotiable Instruments Act, the title in the petitioners as bearers resulted from the mere delivery to them. Under thse circumstances, it seems to us that Section 37, Judicial Code, which is Paragraph 80, of Title 28, Ann. Code, in no event has any controlling effect. All of the bonds are payable to bearer, and the delivery of them to the committee for the numerous purposes comprehended in the contract would seem to us to put such title in them, regardless of the question of assignment, as to authorize the maintenance of suit in the federal court.

In this connection we quote from the Town of Thompson vs. Perrine, 106 U. S. 589, 27 L. Ed. 299, as follows:

"* * * apart from any consideration of the question as to the negotiability, according to the law of merchant, of these coupons, Perrine is not an assignee within the meaning of the Act of 1875, nor of the previous statutes relating to the same subject. Giving the words, assignee and assignment, their broadest signification and conceding that, in some cases the holder of a promissory note may become such in virtue alone of an assignment; yet, according to the established construction of the Judiciary Acts of 1789, the right of the holder of a promissory note or bond, payable to a particular person or bearer, to sue in his own name, did not depend upon the citizenship of the named payee or of the first or any previous holder; this, because in all such cases, the title passed by delivery and not in virtue of any assignment. In Bullard v. Bell, 1 Mason, 243, Mr. Justice Story said that to bring a case within the exception contained in the 11th Section of the Act of 1789, 'The action must not only be founded on a chose in action, but it must be assignable; and the plaintiff must sue in virtue of an assignment.' A 'note,' said he, 'payable to bearer, is often said to be assignable by delivery, but in correct language, there is no assignment in the case. It passes by mere delivery; and the holder never takes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person who shall become the bearer; it is, therefore, payable to any person who successively holds the note bona fide not by virtue of any assignment of the promise, but

by an original and direct promise, moving from the maker to the bearer'. In Bank v. Wister, 2 Pet. 326, the court said that it had 'Uniformly held that a note payable to bearer is payable to anybody, and is not affected by the disabilities (to sue) of the nominal payee.' Thompson v. Lee Co., 3 Wall 331 (70 U. S. XVIII 178); Bushnell v. Kennedy, 9 Wall 391 (76 U. S. XIX 738); Lexington v. Butler, 14 Wall 293 (U. S. XX 812); Cooper v. Thompson, 13 Blatchf (434); Coe v. R. R. Co., 19 Blatchf 522.

"The coupons here in suit are payable to the holder thereof, and, upon the authority of the adjudged cases, Perrine is not an assignee within the meaning of the Act of 1875 (18 Stat. at L. 470). He is entitled to sue without reference to the citizenship of any previous holder."

Waite v. Santa Cruz, supra: In this case, the court, on page 567 of 46 L. Ed. quotes the Act embraced in Par. 80 of Title 28, and then propounds the question, 'Does the present case come within this provision of the Act of 1875 in respect of any cause of action embraced in it? It does not, if the only objection to the jurisdiction of the circuit court is that the plaintiff was invested with the legal title to the bonds and coupons, simply for the purpose of collection, but if the transfer was made for the purpose, in any way, of creating a case cognizable in the circuit court, of which it could not otherwise have taken cognizance, then the duty of this court is to take notice of that effect and give effect to the statute of 1875."

On the same page the court quotes the case of Williams v. Nottawa, 104 U. S. 209, 26 L. Ed. 719, to the effect that since the enactment of the statute the courts of the United States cannot entertain a suit upon bonds payable to bearer, the real owners of which have transferred them to the plaintiff of record for the *sole purpose* of suing thereon in the courts of the United States for the benefit of the owners who could not themselves sue in such courts. The court there found that the plaintiff did not own the bonds or coupons in suit but held them for collection only, which circumstance rendered the court without jurisdiction. The court expressly states that if the legal title to the bonds and coupons was put in the plaintiff simply for purposes of collection, then the statute has no application and does not exclude jurisdiction. The court in the next sentence then states that if the transfer was made in any way for the purpose of creating a case cognizable in the circuit court, then the court is without jurisdiction, and further on in the opinion the court expressly states that the bonds and coupons being placed in the hands of the plaintiff only for collection, the federal court is without jurisdiction to render any judgment.

The record in that case, according to the opinion of this Honorable Court, showed beyond any doubt that the plaintiff included in his suit a large number of claims owned by others than himself, but each by reason of their

respective small amounts, could not have been sued on separately in the United States District court by their real owners, who had put them into the plaintiff's hands for collection. The court stated that unless it either appeared from the pleadings or from the record that the court was without jurisdiction, jurisdiction would be sustained.

The contract under which the plaintiffs proceed, it seems to us, certainly excludes the idea that the transfer was made for the sole purpose of creating a jurisdiction in the federal courts. The contract certainly has the effect of depositing the legal title in the plaintiffs for purposes different and distinct from the mere purpose of maintaining a suit in a federal court. The contract as a whole reflects a purpose to make a settlement and adjustment and otherwise protect the rights of the bondholders. Section 13 authorizes the plaintiffs to prepare and adopt plans for refinancing, readjustment, liquidation, and settlement, of all the bonds and other obligations of the city embraced in the bonds and coupons. Therefore, if the courts mean to say that it is only when the sole purpose of the transfer is to create federal jurisdiction that the suit will be dismissed, then it seems to us that the terms of this contract are such as to eliminate plaintiffs from the effect of the statute, and to furnish no basis for dismissal of the suit on the theory of collusion to confer federal jurisdiction.

Lake County v. Dudley, supra: The jurisdiction of the court was attacked in this case on the ground that the transfer of certain coupons was made to Dudley collusively and to put the apparent title in him merely to make a case cognizable by the Federal court on the ground of diverse citizenship. Dudley's deposition was taken, and this deposition revealed that the transfer was made to him for the sole purpose of creating a case cognizable before the Federal courts. The court stated that it was certain that he did not own any of the coupons sued upon and that his name, without his consent, was used in order that the United States Courts might acquire jurisdiction and render judgment for the amount of all the coupons in suit, a large number of which were owned by citizens of Colorado, which was the residence of the county which issued the bonds. The court expressly states that the apparent title was put in Dudley without his knowledge and without his consent, and only that he might represent the interests of the real owners, and his name being used merely for their benefit under a collusive and simulated transfer, a fraud was perpetrated upon the jurisdiction of the court, which required the dismissal of the suit.

Inhabitants of Bernard's, etc. vs. Township of Stebbins, 108 U. S. 341, 21 L. Ed. 959. In this case a citizen of New York sought to maintain a suit upon coupons aggregating $18,600 owned by citizens of New Jersey. In these

circumstances the court held that the plaintiff could not maintain the suit as to the $18,600 worth of coupons owned by citizens of New Jersey, their residence being the same as that of the township, and that the suit so far as this sum was concerned embraced coupons in fact owned by citizens of New Jersey, and should have been dismissed. The court found from the record as a positive fact, and states in the opinion, that the transfer was made for the sole purpose of suit in the federal courts.

We do not believe that an analysis of the contract under which these petitioners assert title to the bonds can fairly reveal such an analogy to these cases as to bring it within the rule they enunciate. We stand clearly upon the contract. We can assert no title which it itself contradicts. But when the bonds and coupons were delivered to the petitioners under this contract it seems to us that the result of the transaction in each instance was to put title in the petitioners. There is nothing on the face of the contract in the nature of facts to establish that it was a mere subterfuge for the purpose of invoking the jurisdiction of the United States Courts. It incontestably appears from the face of the instrument that the arrangement was made to afford a means to handle and dispose of the bonds and coupons expeditiously and to the best advantage of the original owners, and to give the plaintiffs such power, control and title as to permit them to work out a refinancing scheme and avoid the incon-

veniences incidental to control of the bonds in numerous hands of different owners. This being true, it seems to us that under these very decisions, when properly analyzed, the courts ought to take jurisdiction.

All the decisions have the ultimate meaning that the purpose of the transfer must be solely to give jurisdiction to the federal courts. If this is only one of the purposes, and there are other bona fide purposes involved in the transfer of title, then such transactions do not constitute a collusion or fraudulent conspiracy to invoke the jurisdiction of the federal courts. This is the understanding we derive from all of the decisions.

All of the instruments involvd in this suit are in the hands of the plaintiffs as holders in due course. They are payable to bearer and they passed by mere delivery. The proof shows without any conflict that all of them were transferred to the plaintiffs by citizens of states other than Texas.

> "The restriction as to suits by assignees, and as to amount in controversy, are distinct and independent. When plaintiff has acquired, in good faith, from citizens of states other than that of which defendant is a citizen, claims amounting in the aggregate to the jurisdictional amount, he has a right to sue on all of such claims in one action in a federal court, although no one of the claims amounted to the jurisdictional amount. The requisite amount and the citizenship necessary to confer jurisdiction

being united in plaintiff, the jurisdiction is not affected by the fact that the several assignors could not have maintained separate suits thereon solely because the claim of each was less than the jurisdictional amount. Hammond v. Cleaveland (C. C. Or. 1885), 23 F. 1; Berheim v. Birnhaum (C. C. Ga. 1887), 30 F. 885; Chase v. Sheldon Roller Mills Co. (C. C. Iowa, 1893), 56 Fed. 625; Davis v. Mills (C. C. Conn., 1900), 99 Fed. 39; Bowden v. Burnham (Kas. 1894), 59 F. 752, C. C. A. 248.

"Despite the rule that the court shall not have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of the assignee unless such suit might have been prosecuted in such court, if no assignment or transfer had been made, several claims assigned by different owners, all of whom were citizens of other states than that of defendant, may be united to give the jurisdictional amount. Bergman v. Inman, Poulsen & Co. (C. C. Or. 1898), 91 F. 293; Davis v. Mills (C. C. Conn. 1900), 99 F. 39; Brigham-Hopkins Co. v. Cross (C. C. Wash. 1901), 107 F. 769.

"Action may be maintained by an assignee of several claims each less, but aggregating more, than the jurisdictional amount; the assignors having been citizens of states other than that of defendant. Davis v. Mills (C. C. Conn. 1900), 99 F. 39."

The debt being payable to bearer and having been made by a corporation, the plaintiffs as transferees may

recover in the federal court whether or not their transferors could have done so. It is to be borne in mind in this connection that the record is barren of any proof that any particular transferor to the plaintiffs held bonds and coupons in an amount less than the jurisdictional amount of the federal courts.

Independent School Dist. v. Rew, 111 Fed. 1, and cases therein cited on page 4.

Scott County v. Advance Rumley Thresher Co., 288 Fed. 742, 743.

Village of Kent v. Dana, 100 Fed. 57.

THE CONTRACT WAS AN EXPRESS TRUST DEPOSITING TITLE IN THE COMMITTEE FOR STATED PURPOSES

The agreement contains every element essential to the creation of an express trust. Although the petitioners are not specifically named as Trustees, they are clothed with all the powers, rights, duties, and responsibilities of Trustees. There is a clear and explicit transfer to them of the legal title. The object and purpose of the trust is set out. The fund and property transferred are definitely named. The bondholders are the beneficiaries.

The defendant as well as the trial court treated the agreement as a trusteeship.

The features which distinguish a trust relation from

one of agency characterize the deposit agreement. This court in Taylor v. Mayo, 101 U. S. 330, 28 L. Ed. 163, defines a trustee as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another. Here the title and interest of the bondholders were vested in the petitioners for the benefit of the bondholders, and certain definite powers and authority were expressly set forth as being reposed in the petitioners to be exercised in behalf of all the bondholders who deposited their bonds and coupons under the terms of the agreement. Thus a trust is raised by the terms of the contract between the petitioners and the accepting bondholders. The purpose and scope of the trust are definitely marked. A trustee of an express trust to whom legal title is transferred may maintain an action thereon in his own name. Under the terms of the agreement between the depositing bondholders and the petitioners, the petitioners alone can exercise any dominion or control over the bonds or assert any right, either out of or in court. It is the relation which the trustee bears to the subject matter of the suit, and not that of the beneficiaries under the trust, which determines jurisdiction. Kokusi Kisen Kabushiki Kaisha v. Argos Merc. Corporation, 280 Fed. 700 (Certiorari denied).

That a trust relation is created under the contract involved in this case is established by the effect of the following cases:

Fuller v. Venable, 118 Fed. 553.

Parker v. New England Oil Corp., 8 Fed. (2) 392.

The petitioners are made trustees of an express trust by all the essential terms of the deposit agreement, and as such trustees may maintain this action in their own names and rights.

Dodge v. Tulleys, 144 U. S. 451, 36 L. Ed. 501.

Susquehanna & Wyo. R. R. Co. v. Blatchford, 11 Wall, 172, 20 L. Ed. 179.

Newhouse v. First Natl. Bank of Chicago, 13 F. (2d) 887.

Smith v. Bell, 217 F. 243.

Shipp v. Williams, 62 F. 4.

Morris v. Lindaner, 54 F. 23.

From the case of Dodge v. Tulleys, supra, we quote the following pertinent excerpt:

"Another defect claimed is that the citizenship of Hesse, the obligee in the bond, is not alleged; but this is unnecessary. The suit is in the name of Tulleys, trustee, to whom the legal title was conveyed in trust, and who was, therefore, the proper party in whose name to bring suit for foreclosure. It happens in this case that there was but one party beneficiary under the trust deed; but it often is the case, as in railroad trust deeds, that the bene-

ficiaries are many. But whether one or many, the trustee represents them all, and in his name the litigation is generally and properly carried on. The fact that a beneficiary in a trust deed may be a citizen of the same State as the grantor, would not, if the trustee is a citizen of a different state, defeat the jurisdiction of the Federal Court."

This record reflects a situation in which a municipality in Texas has issued and sold its bonds to numerous citizens of other states. It has defaulted upon those obligations. The holders of those obligations have selected and constituted a committee as nothing less nor more than trustee to take charge of and handle for all of the parties thus interested the obligations of the municipality. The committee as Trustees for such bondholders are clothed with various and sundry rights and powers which encompass far more than the idea of mere litigation.

An unbiased reading of the deposit agreement does not suggest, we think, the idea that it involves a collusive undertaking to circumvent the federal jurisdiction statute. It reflects a situation in which the City of Cisco has become the debtor of numerous nonresidents of Texas through the sale of its bonds. The conclusion is derivable from it (and such conclusion was derived by the trial judge) that these holders of bonds are numerous and far scattered. They have a common interest in salvaging their investment. They resort to what has become a common thing, and in reality the only practical means

of dealing with such a situation, that is, to pool their interests and thereby render it possible for a small number of people to deal with the situation and undertake to solve its difficulties. In this instance the plaintiffs themselves were the owners of some of the bonds before the contract was made. They proposed to other bondholders the transfer of their bonds and coupons to them. In response to this proposition more than two million dollars worth of the bonds held by widely scattered owners were transferred to them. Dominion and ownership over these bonds and coupons were reposed in them so that they in their discretion might deal with such bonds and coupons in any way that might achieve a specific adjustment through refinancing, composition, trades and other transactions, as well as through resort to litigation.

In these circumstances, we submit that it is a harsh and extreme construction of the Collusive Act Provision to deny to these citizens of the United States, who are not citizens of Texas, the right to their day in a federal court on the unsustained theory that the plaintiffs are mere collectors and that there is no good faith in the transfer and delivery of the bonds and coupons to them, or in the terms and provisions of the contract in connection with which they received title to the bonds and coupons. Certainly the court should have definite proof rather than personal opinion to sustain such position, and all the proof in the record including the very nature of the deposit agreement refutes that position.

We respectfully submit that upon the foregoing considerations and upon those embraced in the petition for certiorari, the writ should be granted.

Respectfully submitted,

CALDWELL & RAYMOND,
115 Broadway, New York, N. Y.

McBRIDE, O'DONNELL & HAMILTON,
Dallas, Texas.

By Dexter Hamilton
Of Counsel.

Attorneys for Petitioners.